A

Ionut Alexandru Gologan v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–275–11 OF 2013
AZIAH ALI, ZAKARIA SAM AND AHMADI ASNAWI JJCA
5 OCTOBER 2015

C *Criminal Procedure — Defence — Explanation by accused — Whether accused failed to explain or rebut presumption under s 37(d) of the Dangerous Drugs Act 1952 that he had knowledge of dangerous drugs in bag — Whether bare assertion by accused that bag given to him by someone else insufficient to rebut presumption he had knowledge of the drugs — Whether accused's failure to provide police with*
D *particulars of that 'someone else' apart from merely giving his name rightly led trial court to find that person did not exist — Whether trial court correct to find accused engaged in drug trafficking*

E The appellant, a Romanian, was convicted and sentenced to death by the High Court on a charge of trafficking in 1,494.8g of methamphetamine. The drugs were concealed in a trolley bag the appellant was lugging when he arrived at the Kuala Lumpur International Airport from Manila. Customs officers at the airport discovered the drugs within a lining in the bag after a scan showed a green image even after the bag had been emptied of the female clothing it
F contained. The appellant had told the customs officers that the clothing belonged to his mother and that she was in Romania. In his defence, however, the appellant told the trial court that when he met his Romanian friend ('Daniel') in Manila, the latter had asked him to deliver the bag to his ('Daniel's') girlfriend, Matha, who had flown to Malaysia earlier. The appellant
G agreed to do so and when he found the bag to be full of women's clothing, he assumed they belonged to Matha. The appellant asserted he had no knowledge of the drugs in the bag. The trial court doubted Daniel's existence because of the appellant's failure to give police any further particulars of Daniel apart from his name. The court also found Matha was a creation since her existence was
H never put to any of the prosecution's witnesses when they testified. Finding that the appellant had sole custody of the bag and that there was no break in the chain of evidence regarding the identity of the drugs, the trial judge invoked the presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the DDA') that the appellant had deemed possession and knowledge of the drugs. The
I judge further found the appellant's act of 'importing' the drugs fell within the definition of 'trafficking' under s 2 of the DDA. At the close of the defence's case, the trial judge found the appellant had failed to explain or rebut the presumption of his knowledge of the drugs. In his instant appeal against conviction and sentence, the appellant contended that: (a) the trial judge

placed an unjustified burden on him to show the existence of Daniel; and (b) despite having given the investigating officer ('PW5') in the case sufficient particulars about Daniel, PW5's investigations in that regard had been shoddy.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) On the evidence, the trial judge committed no error in finding that the prosecution had established a prima facie case against the appellant. There was overwhelming evidence that the appellant had custody and control of the bag in which the drugs were concealed. Apart from invoking deemed possession and knowledge under s 37(d) of the DDA, the trial judge rightly invoked s 2 of the DDA (see para 13).

(2) The trial court did not place a heavy burden on the appellant to prove that Daniel existed. The judge did not draw any adverse inference against the appellant for not seeking assistance from the Romanian embassy about Daniel. The trial judge's remark on the appellant's failure to provide police sufficient particulars of Daniel was an exercise in evaluating the veracity of the appellant's story which went to the weight of his evidence. The trial judge noted that a bare assertion, without more, that the bag was given to him by someone else was insufficient on the appellant's part to rebut or explain his assertion that he had no knowledge of the drugs (see para 24).

(3) It was apparent from the evidence of PW5 that the appellant had merely mentioned Daniel in his cautioned statement and had not indicated to PW5 which of the numbers in his handphone or SIM card was Daniel's number although there was ample opportunity for him to have done so. This led to the trial judge finding the appellant had not given sufficient particulars to PW5 and he doubted Daniel's existence. Considering the evidence, the trial judge did not err in doubting Daniel's existence since it was evident that apart from giving Daniel's name, the appellant supplied no further particulars about Daniel (see para 26).

(4) The appellant's explanation regarding the bag was inconsistent. Both the customs officers, PW2 and PW3, heard the appellant say that the clothes in the bag belonged to his mother, prompting PW3 to ask where the mother was and the appellant replying that she was in Romania. This evidence was not challenged by the defence. There was no evidence the appellant had informed PW5 about Matha, yet in his defence the appellant said the clothes belonged to Matha who was supposed to have collected the bag from him in Malaysia. The issue of 'Matha' was never put to PW2 or PW3. Further, if Matha was in Malaysia, why did the appellant mention 'Romania' in his reply to PW3? There was no reason to disbelieve PW3 on this issue. This court agreed with the trial judge that the appellant's story that Daniel had given him the bag was a bare assertion and that 'Matha' was an afterthought (see para 27).

(5) The appellant failed to rebut the presumption under s 37(d) of the DDA on a balance of probabilities. The net weight of the methamphetamine was almost 1.5kg, a quantity which was much larger than was likely to be needed for the appellant's own consumption. The irresistible inference was that he was transporting the drugs to Malaysia for the purpose of trafficking (see para 28).

[Bahasa Malaysia summary

Perayu, seorang warganegara Romania, telah disabit dan dihukum mati oleh Mahkamah Tinggi atas pertuduhan mengedar dadah methamphetamine seberat 1,494.8g. Dadah itu telah disembunyikan dalam beg troli yang dibawa perayu apabila dia tiba di Lapangan Terbang Antarabangsa Kuala Lumpur dari Manila. Pegawai-pegawai kastam di lapangan terbang menjumpai dadah itu dalam lapisan dalam beg selepas imbasan menunjukkan imej berwarna hijau meskipun beg itu telah dikosongkan dengan pakaian wanita yang terdapat di dalamnya. Perayu telah memberitahu pegawai kastam bahawa pakaian itu milik ibunya dan dia berada di Romania. Dalam pembelaannya, bagaimanapun perayu memberitahu mahkamah perbicaraan bahawa apabila dia berjumpa dengan kawan Romanianya ('Daniel') di Manila, Daniel memintanya menghantar beg itu kepada teman wanitanya, Matha, yang telah berlepas ke Malaysia terlebih dahulu. Perayu bersetuju untuk berbuat demikian dan apabila dia mendapati beg itu penuh dengan pakaian wanita, dia beranggapan ia milik Matha. Perayu menegaskan dia tidak mengetahui tentang dadah dalam beg itu. Mahkamah perbicaraan meragui kewujudan Daniel kerana kegagalan perayu memberikan polis apa-apa butiran lanjut tentang Daniel selain daripada namanya. Mahkamah juga mendapati Matha adalah rekaan kerana kewujudannya tidak pernah dikemukakan sebagai saksi pendakwaan apabila mereka memberi keterangan. Dengan mendapati bahawa hanya perayu mempunyai kawalan ke atas beg itu dan rantaian keterangan tidak terputus berkaitan identiti dadah itu, hakim perbicaraan menggunakan andaian di bawah s 37(d) Akta Dadah Berbahaya 1952 ('ADB') bahawa perayu dianggap memiliki dan mempunyai pengetahuan tentang dadah itu. Hakim selanjutnya mendapati perlakuan perayu 'importing' dadah itu terangkum di bawah tafsir 'trafficking' di bawah s 2 ADB di penutup kes pembelaan, hakim perbicaraan mendapati perayu telah gagal menjelaskan atau mematahkan andaian pengetahuannya tentang dadah itu. Dalam rayuannya ini terhadap sabitan dan hukuman, perayu, berhujah bahawa: (a) hakim perbicaraan telah meletakkan beban yang tidak adil ke atasnya untuk menunjukkan kewujudan Daniel; dan (b) meskipun telah memberikan pegawai penyiasat ('PW5') dalam kes itu butiran yang mencukupi tentang Daniel, siasatan PW5 berkenaan itu tidak memuaskan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Berdasarkan keterangan, hakim perbicaraan tidak melakukan apa-apa

kekhilafan dalam memutuskan bahawa pendakwaan telah membuktikan kes prima facie terhadap perayu. Terdapat keterangan yang ketara bahawa perayu mempunyai jagaan dan kawalan beg itu di mana dadah itu disembunyikan. Selain daripada menggunakan andaian milikan dan pengetahuan di bawah s 37(d) ADB, hakim perbicaraan sewajarnya telah menggunakan s 2 ADB (lihat perenggan 13).

(2) Mahkamah perbicaraan tidak meletakkan beban yang berat ke atas perayu untuk membuktikan Daniel wujud. Hakim tidak membuat apa-apa inferens bertentangan terhadap perayu kerana tidak memohon bantuan dari kedutaan Romania tentang Daniel. Kenyataan hakim perbicaraan tentang kegagalan perayu untuk memberikan polis butiran yang mencukupi tentang Daniel merupakan pelaksanaan untuk menilai kebenaran cerita perayu yang mengukuhkan keterangannya. Hakim perbicaraan menyatakan bahawa pernyataan kosong, tanpa apa lagi, yang beg itu telah diberikan kepadanya daripada seorang lain tidak mencukupi di pihak perayu untuk mematahkan atau menjelaskan penegasannya bahawa dia tiada pengetahuan tentang dadah itu (lihat perenggan 24).

(3) Adalah jelas daripada keterangan PW5 bahawa perayu hanya menyebut tentang Daniel dalam kenyataan beramarannya dan tidak menunjukkan kepada PW5 mana di antara nombor dalam telefon bimbit atau kad SIMnya adalah nombor Daniel meskipun terdapat peluang yang mencukupi untuknya berbuat demikian. Ini membawa kepada penemuan hakim perbicaraan yang perayu tidak memberikan butiran mencukupi kepada PW5 dan beliau meragui kewujudan Daniel. Berdasarkan keterangan itu, hakim perbicaraan tidak terkhilaf untuk meragui kewujudan Daniel kerana ia jelas bahawa selain daripada memberikan nama Daniel, perayu tidak memberikan apa-apa butiran lain (lihat perenggan 26).

(4) Penjelasan perayu berhubung beg itu tidak konsisten. Pegawai kastam, PW2 dan PW3 telah mendengar perayu mengatakan pakaian dalam beg itu milik ibunya, mendorong PW3 untuk bertanya di mana ibuya berada dan perayu menjawab dia di Romania. Keterangan ini tidak dicabar oleh pembelaan. Tiada keterangan yang telah diberikan oleh perayu kepada PW5 tentang Matha, malah dalam pembelaannya perayu menyatakan pakaian itu milik Matha yang sepatutnya mengambil beg itu daripadanya di Malaysia. Isu 'Matha' tidak pernah dikemukakan kepada PW2 atau PW3. Selanjutnya, jika Matha berada di Malaysia, kenapa perayu menyebut 'Romania' dalam jawapannya kepada PW3? Tiada sebab untuk tidak mempercayai PW3 tentang isu ini. Mahkamah ini bersetuju dengan hakim perbicaraan bahawa cerita perayu bahawa Daniel telah memberikannya beg itu adalah pernyataan kosong dan bahawa 'Matha' hanya suatu yang telah difikirkan kemudian (lihat perenggan 27).

(5) Perayu telah gagal untuk mematahkan andaian di bawah s 37(d) ADB

atas imbangan kebarangkalian. Berat bersih methamphetamine itu adalah hampir 1.5kg, satu kuantiti yang lebih besar daripada apa yang mungkin diperlukan untuk kegunaan perayu sendiri. Inferens yang tidak dapat disangkal adalah bahawa dia sedang menghantar dadah ke Malaysia bagi tujuan pengedaran (lihat perenggan 28).]

Notes

For cases on explanation by accused, see 5(2) *Mallal's Digest* (5th Ed, 2015) paras 2128–2129.

Cases referred to

Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64; [1980] 1 LNS 181, PC (refd)

PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685; [2005] 1 CLJ 713, FC (refd)

Legislation referred to

Dangerous drugs Act 1952 ss 2, 37(d), First Schedule

Appeal from: Criminal Trial No 45A-277–12 of 2012 (High Court, Shah Alam)

N Sivananthan (Shazlin Mansor with him) (Sivananthan) for the appellant.
Norinna Bahadun (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA:

INTRODUCTION

[1] The appellant, a Romanian was charged with an offence under the Dangerous Drugs Act 1952 ('the Act') as follows:

> That you on the 26th of June 2012 at about 11.55 a.m., at the Passengers' Examination Unit, at the International Arrival Hall of Kuala Lumpur International Airport, in the District of Sepang, in the state of Selangor, did traffic in dangerous drug to wit methamphetamine weighing 1,494.8 grams and you have thereby committed an offence under Section 39B(1)(a) of the Dangerous drugs Act 1952 and punishable under Section 39B(2) of the same Act.

[2] At the conclusion of the trial, the learned trial judge found him guilty as charged. He was convicted and sentenced to death.

THE PROSECUTION CASE

[3] On 26 June 2012, customs officer Mohd Shahril bin Mohd Sukaimi ('PW2') together with customs officer Fairus Isfan ('PW3') and another officer by the name of Shazrul were on duty at the Cawangan Pemeriksaan Penumpang 1 ('CPP1') at the Kuala Lumpur International Airport ('KLIA'). At about 11.55am, PW2 was manning the scanning machine and he saw the appellant walking from the direction of carousel 'G'. The appellant was alone. The appellant was pulling two bags, one a dark coloured trolley bag with the brand name 'Summernight' (exh P15). There was a baggage tag with the appellant's name (exh P16) affixed to the bag's handle. The other was a smaller dark coloured trolley bag with the brand name 'CZYS' (exh P81).

[4] The appellant was directed to put the bags into the scanning machine, which he did. The scan of exh P15 showed a green image. PW2 asked PW3 to inspect the bag. PW3 asked the appellant to open the bag. Inside the bag were female clothing. PW3 asked the appellant in English whose clothing were in the bag. The appellant replied that the clothing belonged to his mother. Since the appellant was alone, PW3 asked the appellant where his mother was and the appellant replied that his mother was in Romania. PW2 stated in cross-examination that he had heard PW3 asked the appellant about the bag and the appellant replied that the bag belonged to him but the items in the bag belonged to his mother.

[5] PW3 removed the clothing and again scanned the bag. The green image still showed up. The appellant was asked to put the clothing back into the bag. A scan of the other bag did not reveal anything suspicious. PW2 asked the appellant for his passport (exh P60) which PW2 gave to PW3. Then PW3 together with PW2 brought the appellant and the two bags to the CPP1 examination room.

[6] In the examination room, the clothing were removed from the bag. PW3 examined the bag while PW2 kept watch over the appellant. At the bottom of the bag, PW3 opened the zip of the cloth lining of the bag and saw the trolley handle. PW3 also saw a rubber piece lining beneath the trolley handle which appeared lumpy ('gelembung'). PW3 used a screw driver to lift up a corner of the rubber lining and he saw a piece of cardboard (exh P107) and underneath the cardboard PW3 saw a brown coloured package. PW3 used a knife to make a cut at the corner of the package in order to check the contents. PW3 saw that the package contained white crystalline powder suspected to be drugs. PW3 then placed the contents of the bag back into the bag and he contacted his superior officer. PW2 who was present stated that before the bag was examined in the room, he noticed that the appellant's hands were shaking and he looked worried. When the drugs were found, the appellant looked as if

he was surprised ('OKT kelihatan seolah-olah terkejut'). PW2 agreed with learned counsel that the appellant had said that the drugs were not his.

[7] The investigating officer ('IO'), customs officer Mohammad Rushdi bin Abdul Majid ('PW5') arrived at about 1.35pm together with four other customs officers. PW3 then examined the bag in the presence of the appellant and the IO customs officer Mohd Saifullah bin Sahlan (PW1) was directed to take photographs. PW2 was directed to record the exhibits recovered.

[8] PW3 marked the bag exh P15 as 'A', the rubber piece (exh P17) as 'A1', the package which PW3 had made a cut earlier as 'A1(1)' and the second package as 'A1(2)'. PW3 removed the baggage tag which bore the appellant's name and a serial number (exh P16) because he feared that it would be torn or accidentally removed ('tertanggal'). PW3 put his signature and date on all the exhibits. Similarly, PW5 the IO had also put his signature on the exhibits recovered. PW2 prepared the search list (exh P10). The exhibits recovered and the appellant were then handed over to the IO (exh P91).

[9] PW5 then took the appellant and the exhibits to the customs complex at KLIA. PW5 kept the two packages inside a locked steel cabinet inside his office. Only he had access to the steel cabinet. The other exhibits were kept in his office. According to PW5, only he had the key to his office and his office is always locked whenever he is away from his office.

[10] On 2 July 2012, PW5 packed the drugs into a box. PW5 marked 'RM' on the box, wrote the case reference number and sealed the box with a customs seal (exh P90). PW5 handed the box to the chemist, Suhana bt Ismail ('PW4') who confirmed that inside the box were two packages marked as 'A1(1)' and 'A1(2)'. PW4 then issued an acknowledgment receipt (exh P7). Pursuant to her analysis of the drugs, PW4 prepared a chemist report (exh P8) which shows that the package A1(1) contained 661.0g methamphetamine and package A1(2) contained 833.8g methamphetamine. Methamphetamine is listed in the First Schedule to the Act. On 27 November 2012 PW4 handed to PW5 the exhibits together with the chemist report.

[11] PW5 said that based on a hotel voucher issued by 'Happy Tours Manila' (exh P61) which was recovered from the appellant, he went to Corus Hotel to investigate but he was told that the hotel had no dealing with 'Happy Tours and Travel Corp' and the hotel had no reservation under the appellant's name. In cross-examination, PW5 agreed with learned counsel that the appellant had stated in his cautioned statement that the bag did not belong to him. PW5 had also stated that he had checked the appellant's handphone and discovered that

all the numbers were Romanian. He agreed that he did not check the numbers with the Romanian embassy. Another telephone sim card recovered from the appellant showed numbers in Manila.

FINDING OF THE TRIAL JUDGE

[12] At the end of the prosecution case, the trial judge was satisfied that the prosecution has established a prima facie case against the appellant. The trial judge found as follows:

(a) the appellant had sole custody of the bag in which the drugs were found;

(b) there is no break in the chain of evidence regarding the identity of the drugs; and

(c) the chemist has accurately indentified and quantified the drugs.

The trial judge invoked the presumption under s 37(d) of the Act. His Lordship found that there is direct evidence that the appellant had brought the drugs from another country into Malaysia. The appellant's act of 'importing' the drugs falls within the definition of 'trafficking' under s 2 of the Act. The appellant was ordered to enter his defence.

[13] We agree with the finding of the trial judge. On the evidence as presented by the prosecution, we find no error committed by the trial judge in his finding that the prosecution has established a prima facie case against the appellant. We find that there is overwhelming evidence that the appellant had custody and control of the bag in which the drugs were concealed. Apart from the deemed possession and knowledge under s 37(d), the trial judge had rightfully invoked s 2 of the Act.

THE DEFENCE CASE

[14] The appellant elected to give sworn evidence. He was the sole witness for the defence. According to the appellant, he lives in Romania with his father and grandmother. His father works as a driver and earns approximately RM3,000 which is equivalent to RM3,000 per month. His grandmother is a retiree with a monthly pension equivalent to RM1,000. His parents were divorced and his mother has remarried with another child. He had worked in Germany for two years where his stepfather, who was working there, had found a job for him. He returned to Romania because he wanted to take care of his father and his grandmother. Prior to his visit to Malaysia, he had been working in the construction industry and as a part time driver for about two months.

[15] The appellant had started his vacation from Romania on 13 June 2012 when he flew to Athens and stayed there for four days. On 17 June 2012 he

went on a one day visit to Paris. From Paris he flew to Cotonou, which is the capital of the Republic of Benin in West Africa. He stayed in Cotonou for two days. On 21 June 2012 he flew to Nairobi where he was on transit before flying to Doha. He was again on transit in Doha before he flew to Manila. He arrived in Manila on 23 June 2012.

[16] In Manila the appellant said he had met up with some friends who were also on vacation. There, his childhood friend by the name of 'Daniel' had asked him to carry the bag exh P15 to give to Daniel's girlfriend by the name of 'Matha' who had flown to Malaysia a few weeks earlier. Matha was supposed to return to Manila to collect the bag. To save her the hassle, Daniel requested that the appellant take the bag with him. Matha would collect the bag (exh P15) from him. The appellant said that he had agreed to carry the bag because he had only a small hand luggage with him. Daniel went back to Romania with the other friends. According to him, he had checked the bag and found that it contained female clothing.

[17] The appellant said that he had bought a return ticket to Manila and from Manila, he was to fly back to Romania. He said he bought the return ticket because it was a special offer from Daniel. He made the travel arrangements to Malaysia himself. The appellant said that he had made the hotel booking with 'Happy Tours' in Manila and he was given a voucher which he was to present to the hotel. He was supposed to stay at Corus Hotel. The appellant flew to Kuala Lumpur alone.

[18] The appellant stated that when he was asked by the officer whether the big bag was his, he replied that it was not and that he was carrying the bag for his friend and the clothes inside the bag belonged to his friend's girlfriend named Matha. The appellant said that because of his limited English, he used the word 'women' and 'Matha'. He said that he was shocked when the drugs were discovered because the bag was supposed to contain women's clothing only.

[19] Thus the essence of the appellant's defence is that he was an innocent carrier. His evidence sought to show that the drugs had been concealed in the bag without his knowledge and that he was duped by his friend Daniel to carry the bag with the drugs from Manila to Malaysia.

FINDING OF THE TRIAL JUDGE

[20] The trial judge doubted the existence of Daniel because His Lordship found that the appellant had failed to supply any further particulars of Daniel to the police. The trial judge opined that the least that the appellant could have done was to get the information from the Romanian consulate since His

Lordship noticed that some officials from the consulate were present in court during the trial. With regard to Matha, the trial judge found that it was an afterthought since this was not put to any of the prosecution witnesses. In cross-examination the defence had only put to the witnesses that the appellant had used the word 'woman'. In the upshot, the trial judge found that the appellant had failed to explain or rebut that he had no knowledge of the illicit drugs found in the bag and the prosecution has discharged its burden to prove their case beyond reasonable doubt.

THE APPEAL

[21] Before us, learned counsel raised two grounds:

(a) that the trial judge had placed an unnecessary burden on the appellant to show the existence of Daniel; and

(b) that the IO had failed to investigate the details of Daniel despite sufficient particulars being provided by the appellant.

[22] The first issue relates to what the trial judge had stated in his grounds of judgment as follows (p 240 appeal record):

> A bare assertion by the accused without anything more, that the bag was given by someone else and he had no knowledge of the contents is insufficient either to rebut or explain the presumption of knowledge against him. The defence has to at least lead some evidence to convince the court that this could have probably happened.
>
> The existence of the person called Daniel is in doubt. The accused claims this person is a childhood friend yet he has failed to supply any further particulars to the police. The least he could have done is get the information from the Romanian consulate. I noticed some officials from the consulate were present in the court during this trial.

[23] Learned counsel submitted that the trial judge had erred in placing a heavy burden on the appellant to prove the existence of Daniel and the observation made by the trial judge regarding the presence of the embassy's representatives in court is totally unwarranted and unjustified. It was submitted that this was a misdirection in law.

[24] We have considered the part of the judgment complained of as reproduced above. We are of the view that the trial judge's comment on the failure of the appellant to provide to the police sufficient particulars of Daniel was an exercise of evaluating the veracity of the appellant's story which goes to the weight of the appellant's defence. The reference to the embassy's officials merely indicated that His Lordship was of the view that the appellant could have requested for his embassy's assistance. This is consequent to the statement made by the trial judge in the preceding paragraph that a bare assertion without

anything more is insufficient to rebut or explain the appellant's assertion of absence of knowledge of the drugs. We did not find anywhere in the judgment that the trial judge had drawn any adverse inference against the appellant for not requesting the embassy's assistance. We are unable to agree with learned counsel that the trial judge had placed a heavy burden on the appellant to prove that Daniel exists.

[25] The second issue is regarding the alleged shoddy investigation by the IO It was submitted that despite sufficient particulars having been provided by the appellant, the IO had failed to investigate Daniel's particulars. We have perused the evidence of the IO and in cross-examination, the IO had stated as follows (pp 140–141 and 144 appeal record):

S:	Kamu tahu masa itu dari pengadu bahawa OKT telah mengatakan ini bukan barang dia or beg dia? Bukan kepunyaan dia?
J:	Ya.
S:	Dan sebenarnya berpandukan pada keterangan tertuduh, tertuduh kata beg ini bukan dia punya lah?
J:	Ya.
S:	Dan tertuduh juga mengatakan bahawa seorang yang bernama Daniel yang memberi beg ini kepada beliau, betul?
J:	Betul.
S:	Beliau juga ada kata, Daniel ni beliau ada berhubung dengan telefon beliau dalam pernyataan beliau?
J:	Ya.
S:	Kamu ada menyiasat telefon beliau? Send to forensic?
J:	Ke forensic tidak.
S:	Bagi mengesahkan cerita dia betul atau tidak? Ada hantar ke tidak? Dia cakap dia ada cakap dengan ini Daniel dalam telefon, ada kamu mengesahkan melalui print out telefon itu samada percakapan dia itu betul atau tidak?
J:	Tidak buat.
S:	Ada apa lagi siasatan kamu buat bagi pihak dia? Untuk pastikan cerita dia benar atau pun tidak?
J:	Mengenai telefon, saya ada on the spot dan buka handphone tersebut dan kalau dimaksudkan Daniel, no. tersebut semua no. Romania dan saya sahkan dengan beliau sendiri. Dan dia dakwa ada lagi satu simkad dalam beg duit dia. Saya ambil dan simkad tersebut adalah di Manila dan jenama bukan Malaysia punya.

In re-examination, PW5 states as follows (pp 151–152 appeal record):

S: Kenapa kamu tidak siasat telefon number OKT? **A**

J: Seperti saya cakap tadi pada mahkamah, pertama, ianya tidak membantu dalam siasatan saya memandangkan no. yang saya check pada hari kejadian, bukan nombor di Malaysia, dan dia juga ada cakap pada hari tersebut, ada satu lagi simkad. Jadi saya check through internet, dan hasil siasatan saya mendapati kad tersebut tak silap saya tulis Global, simkad tersebut adalah yang berurusan di Manila. Jadi saya tak buat siasatan lanjut. **B**

S: Tentang penama Daniel di dalam statement dalam rakaman percakapan OKT, adakah kamu mempunyai maklumat mencukupi untuk siasat tentang penama Daniel ini? **C**

J: Dalam keterangan pihak tertuduh, dia ada menyebut, nama Daniel tapi dia tak memberikan apa-apa maklumat untuk saya buat siasatan lanjut, jadi sebagai pegawai penyiasat saya tidak lakukan siasatan susulan untuk kesan Daniel. **D**

[26] It is apparent from the evidence of the IO that the appellant had merely mentioned Daniel in his cautioned statement but he had not indicated to the IO which of the numbers in the handphone or sim card was Daniel's number although there was ample opportunity for him to do so. This led to the trial judge's finding that the appellant had not given sufficient particulars to the IO. His Lordship therefore had doubts as to Daniel's existence. Having considered the evidence, we are of the view that the trial judge has not erred in doubting Daniel's existence since it is evident that, apart from giving Daniel's name, the appellant supplied no further particulars about Daniel. **E** **F**

[27] We find that the appellant's explanation regarding the bag is inconsistent. Both PW2 and PW3 heard him say that the clothes in the bag belonged to his mother. This prompted PW3 to ask him where his mother was, and he said that she was in Romania. This evidence was not challenged by the defence. There is also no evidence that the appellant had informed the IO about Matha. Yet in his defence the appellant said that the clothes belonged to Matha who was supposed to collect the bag from him in Malaysia. The issue of 'Matha' was never put to both PW2 and PW3. Further, if Matha was in Malaysia, why did the appellant mention 'Romania' in his reply to PW3? We find no reason to disbelieve PW3 on this issue. We agree with the trial judge that the appellant's story that Daniel had given him the bag is a bare assertion and that 'Matha' is an afterthought. **G** **H**

CONCLUSION **I**

[28] The trial judge has invoked the presumption of knowledge under s 37(d) of the Act against the appellant. The burden on the defence is to rebut the presumption. '... Once that presumption applies, the persuasive or

evidential burden is on the other party to disprove the presumed fact ...' (per Steve Shim CJ (Sabah and Sarawak) in *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685; [2005] 1 CLJ 713 (FC)). The appellant had failed to rebut the presumption on a balance of probabilities. The net weight of the methamphetamine was almost 1.5kg, a quantity which is much larger than is likely to be needed for the appellant's own consumption. The irresistible inference is that he was transporting the drugs to Malaysia for the purpose of trafficking (*Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181).

[29] For the reasons stated above, we dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar